IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

SATURDAY, THE 18TH AUGUST 2007 / 27TH SRAVANA 1929

AS.No. 425 of 1994()

OS.101/1988 of SUB COURT, KASARAGOD

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APPELLANT: DEFENDANT:

VALYODAN PADMAVATHI, W/O.PULLAYIKODE,
GOPALAN NAMBIAR, RESIDING AT KANIYADKA
OF THEKKIL VILLAGE, THEKKIL P.O., KASARGOD TALUK.

BY ADV. SRI.K.SHRIHARI RAO
SRI.K.R.RAGHUNATH

RESPONDENTS: PLAINTIFF:

C.H.ABDULLAKUNHI, RESIDING AT THEKKIL
FERRY, THEKKIL VILLAGE, P.O.THEKKIL,
KASARGOD TALUK, KASARGOD DISTRICT.

BY ADV. SRI.M.A.MANHU
SRI.M.A.FAYAZ

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 18/08/2007, ALONG WITH AS NO. 655 OF 1994, AS NO. 428 OF 1994, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.Nos.425, 428 & 655 of 1994

Dated this the 18th August, 2007.

J U D G M E N T

These three appeals arise from the common judgment and decree passed in O.S.Nos.101/1988 & 98/1990, on the file of the Subordinate Judge's Court, Kasargod. A.S.No.425/1994 was filed by the defendant in O.S.No.101/1988. A.S.No.428/1994 was also filed by her against the decree passed in O.S.No.98/1990. A.S.No.655/1994 was filed by the plaintiff in O.S.No.101/1988. O.S.No.101/1988 was filed by the plaintiff originally for specific performance. O.S.No.98/1990 was filed by the wife of plaintiff in O.S.101/1998 against the very same defendant for refund of money advanced by the plaintiff for purchase of five cents of property. For the sake of convenience, parties will be referred to as vendor and vendee.

2. The common defendant in O.S.No.101/1988 and O.S.No.98/1990 was the owner of 60 cents of property. On 14.4.1987, she entered into two agreements one with the plaintiff in O.S.No.101/1988 and another with his wife, the plaintiff in O.S.No.98/1990. The vendor had agreed to convey 55 cents of

property to the husband and 5 cents of property to the wife. On the date of execution of the agreements, she received an amount of Rs.5000/= from the husband. Subsequently, on 28.4.1987, the vendor received an amount of Rs.9,000/= from the husband, thus a total amount of Rs.14,000/= was received. The vendor received an amount of Rs.7000/= on the date of agreement, Rs.9000/= on 24.8.1987 and Rs.5000/= on 6.5.1987. The time fixed for the execution of Sale deeds was 30.7.1987. No sale deeds were executed prior to or before 31.7.1987. On 30.7.1987, the vendor went to the Sub Registrar's office and stood as an attestor to Ext.P2 document. On 31.7.1987, she issued two notices, one to the husband and another one to the wife, repudiating the agreements stating that the time was the essence of the contract. It was averred that after entering into an agreement with the proposed vendors, she had agreed to purchase property from one Youseff, and that sale deed could not be executed, because of the fault on the part of the proposed vendees, though she was ready and willing to perform her part. It was further averred that because of the default committed by the proposed vendees, she sustained damages. On 7.8.1987, vendees sent reply notices to the notices issued by the vendor. On 14.12.1987, the plaintiff in

O.S.No.101/1988 issued a notice to the vendor demanding specific performance, to which she sent a reply notice contending that she was not liable to execute the document, and she had already repudiated the agreement for sale.

3. The husband filed O.S.No.101/1988, for specific performance. It was alleged that the appellant in A.S.No.425/1994 had agreed to sell the property to him for a total consideration of Rs.87,500/=, and received an amount of Rs.5000/= as advance on that date. It was further averred that on 28.4.1987, another sum of Rs.9000/= was also paid as sale consideration. The sale deed ought to have executed on or before 30.7.1987, after receiving the balance balance of consideration of Rs.73,500/=. It was averred that the plaintiff has always been ready and willing perform his part of the contract, but the defendant was not ready to perform her part. In spite of several requests, encumbrance certificate and title deeds were not given to the plaintiff. Though several requests were made to hand over the documents, she was asking for time. It was averred that after the time limit, defendant vendor purposefully stopped watering the Arecanut trees in the property causing a damage of Rs.25,000/-.

It was averred that the plaintiff was entitled to get that amount as damages. Subsequently, the suit was amended incorporating an alternate prayer for refund of the advance amount of Rs.14,000/= paid by way of advance.

4. The defendant contented that Rs.14,000/= received by her was by way of earnest money. It was contented that it was the plaintiff who made the breach of contract. He did not get the necessary sale deed prepared, he never made a request for the title deed or encumbrance certificate. It was also averred that there was no understanding between the parties that the vendor will hand over those documents to the plaintiff. The time was the essence of the contract. On the last date of the stipulated period, the defendant had gone to the office of Sub Registrar Udma and waited for the plaintiff for the execution and registration of the document. She went to the office of the scribe Gokuldas Kamath and waited for the vendor at Udma on 30.7.1987. But the plaintiff did not turn up. So, she issued a registered notice repudiating the contract and forfeiting the earnest money deposited. It was also averred that she sustained a loss of Rs.25,000/= on account of the failure on the part of the plaintiff. The

averment that she caused damges was denied. According to her, she entered into an agreement with one Youseff to purchase another property. Hence, she prayed for a dismissal of the suit.

5. The Trial Court disallowed the prayer for specific performance, but passed a decree allowing the plaintiff to recover an amount of Rs.14,000/= with interest. Challenging the refusal of the relief of specific performance, the plaintiff has filed A.S.No.655/1994 and challenging the decree by which the trial court has ordered refund of Rs.14,000/= with interest, the defendant has filed A.S.No.425/1994.

6. The defendant in O.S.No.98/1990 filed A.S.No.428/1994 against the decree and judgment passed in that suit. The plaintiff in O.S.No.98/1990 is the wife of the plaintiff in O.S.No.101/1988. In the plaint filed in O.S.No.98/1990, it was averred that she paid an amount of Rs.21,000/= as advance. She also contented that the defendant entered into an agreement with her, by which she undertook to sell the property for a total consideration of Rupees One Lakh, and the defendant received an amount of

Rs.7000/= on the date of agreement, Rs.9000/= on 28.4.1987 and Rs.5000/= on 6.5.1987. She prayed for return of those amount in advance alone.

7. The defendant raised a contention that amount received by her was by way of earnest money deposit, and the plaintiff was never ready and willing to perform her contract. It was contented that it was the plaintiff who committed the breach of agreement and after the expiry of the period, the defendant repudiated the contract. Hence, the plaintiff is not entitled to get those amounts back.

8. The trial court consolidated O.S.Nos.98/1990 and 101/1988 and tried together. The evidence on recorded on O.S.No.101/1988. PW.1 is the plaintiff in O.S.No.101/1988. He gave evidence for himself and for his wife in O.S.No.98/1990. On the side of plaintiffs, Exts.A1 to A6 were proved and marked. On the side of the defendants, Dws. 1 to 3 were examined. DW.1 is the defendant in both the suits. DW.3 is her husband and D.W.2 is an independent witness. Exts.B1 to B6 were proved and marked. The Trial Court, after considering the evidence, found that the plaintiffs were ready and willing. But it was held that plaintiff in O.S.No.101/1988 is not entitled

to get the relief of specific performance. The claim for damages put forward by the plaintiffs as well as the defendant were disallowed. In both the suits, the court below passed decree allowing the plaintiffs to recover the amounts advanced with interest at the rate of 10% per annum from the date of the suit till the date of decree and thereafter, at the rate of 6% per annum till realisation.

8. The common defendant in O.S.No.101/1988 and O.S.No.98/1990 has filed A.S.No.425/1994 against the decree passed in O.S.No.101/1988 and A.S.No.428/1994 was filed against the decree passed in the suits, by which the plaintiffs were allowed to recover the amounts advanced. The plaintiff has filed A.S.No.655/1994 against the decree disallowing specific performance.

9. The issues arise for consideration in these appeals are, whether the finding of the court below that the plaintiff/vendor in O.S.No.101/1988 was not entitled to get the relief of specific performance is legal and proper; and whether the finding of the court below that the vendor is liable to return the amounts received by her under the two agreements to the vendees is correct.

10. I shall first consider whether the finding of the trial court that plaintiff in O.S.No.101/1988 was not entitled to get the discretionary relief of specific performance was legal and proper. The learned counsel appearing for the appellant-plaintiff in A.S.No.655/1994 had pointed out that the court below had found that the vendor was ready and willing to perform his part of the contract and the vendee raised a false contention that the time was the essence of the contract and set up a false document and fictitious person in respect of a fictitious property, to show that she suffered damages. Specific performance was disallowed on the ground that on the very same day, on the plaintiff and his wife entered into two agreements with the defendant to purchase 55 and 5 cents of property and in case, the relief of specific performance in respect of 55 cents was allowed, the defendant will be prejudiced to a great extent and hence, the amount given as advance were directed to be refunded to the plaintiffs. It is argued that this is a perverse reasoning and the court has no discretion to disallow the specific performance after finding that the vendee was ready and willing to perform his part of the contract.

11. The learned counsel appearing for the appellant relied on a decision reported in **Tek Chand and Others v. Deep Chand** and others (2001 (4) SCC 488), and argued that a party who set up a false claim is not entitled to get any discretionary relief. He also relied on a decision reported in **Aniglase Yohannan v. Ramlatha and Others** (2005 (7) SCC 534), and argued that once the Court finds that there is readiness and willingness on the part of the plaintiff, he is entitled to get a relief of specific performance. It was held as follows:-

> "The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

12. It is true that the court below had found that the vendor set up a fictitious agreement with a fictitious person in respect of a fictitious property. Along with the written statement, the vendee had produced an agreement entered into between herself and one

Youseff. The agreement was dated 20.4.1987. But that agreement was written on a stamp paper purchased on 31.3.1987. DW.1, while giving evidence, has deposed that stamp papers were purchased after the execution of Exts.A1 and A2 agreements. Exts.A1 and A2 agreements were executed on 14.4.1987. The stamp papers for both the agreements were purchased only on 14.4.1987. During cross examination of DW.1, a suggestion was put to her that the agreement with Youseff was a false document. A question was also put to her to the effect that, in Bandadka Village, there was only upto R.S.198 and that there was no re-survey as R.S.927/5. She deposed that she does not know whether in Bandadka Village, re-survey numbers were only up to No.198 or there was any re-survey as R.S.No.927/5. No suggestion was put to her to the effect that Youseff was a fictitious person. Plaintiff did not adduce any evidence to show that within the jurisdiction of Bandadka village, there was no property comprised in Survey No.927/5. But at the time of argument, the learned counsel appearing for the plaintiff, had raised an argument that Youseff was a fictitious person and the agreement was in respect of a fictitious property. The learned Subordidnate Judge readily accepted that

argument and found that there was no person by name Youseff and under the jurisdiction of Bandadka Village, there is no re-survey No.927/5.

13. The learned Subordinate Judge also found that the defendant falsely contented that the parties treated time as the essence of the contract. There cannot be any dispute to the effect that in the ordinary course, in an agreement for sale of immovable property, time is not at all the essence of the contract. In this case, Exts.A1 and A2 were executed on 14.4.1987. Vendees had agreed to purchase the property on or before 30th July 1987. On 31.7.1987, the defendant sent a notice by which she asserted that the time was the essence of the contract. True that, in the reply notice issued, that averment was disputed. But the plaintiff issued a notice calling upon the defendant to execute the sale deed only on 14.4.1987. The suit was presented only on 3.11.1988. It is trite law that even though normally the time is not the essence of agreement for sale, there is no bar for the parties to make the time as the essence of the contract.

14. The plaintiff contented that sale deed could not be executed because of the fault of the defendant. According to him, the defendant did not handover the encumbrance certificate and also the original of title deed. But there is no clause in Exts.A1 or A2, which cast an obligation to the vendor to hand over the originals or copies of these two documents to the proposed vendors. On the other hand, there is an assertion in the agreement for sale to the effect that the property was free from all kind of encumbrance. So, the vendors had no right to make a demand for the encumbrance certificate. If as a matter of fact, he wanted to have the encumbrance certificate, he should have obtained it from the office. Even regarding the demand for specific performance prior to 30.7.1987, there is only oral evidence of plaintiff. Even according to the plaintiff, he approached the defendant on several occasions. But the defendant and her husband were seeking time in some pretext or other. It was clear from the evidence of PW.1 that the defendant had no intention to execute the sale deed from the beginning. If as a matter of fact, the plaintiff was aware of that fact, what prevented him from demanding the copy of title deed or encumbrance certificate in writing was not explained by him. He also did not offer any explanation as to why he

did not demand in writing for the specific performance within the time limit fixed under the agreement. It is true that in the plaint, it was averred that the vendor was ready and willing to get the deed executed after paying the balance consideration. That averment was specifically denied by the defendant in her written statement. In spite of such a denial, the plaintiff did not even formally depose during the chief examination that he was having sufficient funds with him. During cross examination, he had admitted that he do not have any documents to show that he was having sufficient money with him. Hence, I am of the view that the view taken by the court below that plaintiff in O.S.No.101/1988 was not entitled to the relief of specific performance is legal and proper.

15. Of course, it is to be noted that going by the documents, the total extent was only sixty cents 55 cents were agreed to be sold to plaintiff in O.S.No.101/1988 and five cents to his wife. Both the agreements were executed on the very same day. Though the two agreements are in favour of the husband and wife, the conduct of the parties would show that vendor wanted to sell the entire properties to the husband and wife. Of course, the failure of

one of the vendees to insist for specific performance may not be a ground to deny the plaintiff in another suit, but the close relationship of vendors are also to be taken into account. It is true that once it is found, the plaintiff in the suit of specific performance is ready and willing, the court should grant the relief of specific performance. But in Kunjamma v. Chellappan (2004 (3) KLT 78, Short Notes case No.108), a learned Single Judge of this Court, after elaborate survey of number of decisions of the Apex Court, held as follows:-

> "When interests of technicalities and those of substantial justice are pitted against each other, the Court shall strive to advance those of substantial justice rather than technicalities. The decree passed against the appellant in the suit and impugned by her in the regular first appeal preferred before the lower appellate court is a decree for specific performance of contract for sale of immovable property. The right of any party against whom the trial court passes a decree and feels aggrieved by that decree to prefer an appeal is a statutory right conferred on him by the Code. The decision of a Court whether or not to grant positive decree of specific performance in a suit for specific performance rests on the discretion of the Court. In other words, even when the plaintiff is able to prove his claim in full and the court finds that it would be quite lawful to grant a decree to the plaintiff, it is always open to the Court to refuse such a decree on considerations of equity and direct the plaintiff to be satisfied with a decree for money in lieu of one for specific performance."

16. I am in respectful agreement with the legal principles laid down in Kunjamma's case, cited above. In this case, in view of the facts and circumstances narrated above, it is not possible to hold that it is a case in which, the vendee resisted the suit for specific performance by setting up false contentions and fictitious agreement with a fictitious person in respect of a fictitious property. I hold that it is a fit case, in which the trial court has rightly refused the relief of specific performance. So, the appeal filed by the plaintiff/vendee in O.S.No.101/1988 is only to be dismissed.

17. Now, I shall consider the appeal filed by the defendant, A.S.Nos.425 & 428/1994. It is true that in the agreement, the amount is stated as earnest money. But as already stated, it is trite law that in a suit for agreement for sale, the amount received is in the nature of part of sale consideration. If it was earnest money, there was no need for asking for further amounts during the currency of the agreement. The conduct of the vendor also shows that she was waiting for the period of agreement to be over. The period of agreement was over on 30.7.1987. On the very next day, vendor issued a notice. So, the Court below had rightly held that the vendees

were entitled to get the amount advanced with interest. That is a finding of fact based on good evidence. I do not find any reason to interfere with that fact. Hence, the appeals filed by the defendant are only to be dismissed.

In the result, A.S.Nos.425, 428 & 655 of 1994 are hereby dismissed. The parties are directed to suffer their respective costs in the appeal.

C.M.P.No. 2592/1994 in A.S.No.425/1994 & C.M.P.No.2611/1994 in A.S.No.428/1994 dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

A.S.Nos.425, 428 & 655 of 1994

J U D G M E N T

Dated:18th August, 2007.